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IN THE

Supreme Court of the United States

October Term, 1962.

No. 763.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania issued no formal opinion. That court's oral remarks are set forth in Petitioner's Appendix (Pet. 37-38). The opinion of the United States Court of Appeals for the Third Circuit (Pet. 23-31) is reported at 308 F. 2d 856 (1962).

JURISDICTION.

The original judgment of the Court of Appeals for the Third Circuit was entered on September 26, 1962. Petitioner's petition for rehearing was denied by that court on October 23, 1962. The petition for a writ of certiorari was filed on January 21, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the court below correctly held that no right to intervene as a party in a pending private antitrust suit was created in petitioner, a state public utility commission, by virtue of the fact that it might have to re-examine the rate structure of the public utility plaintiff in the antitrust litigation if a recovery should be obtained.

2. Whether the district court abused its discretion in declining to accord petitioner party status under Rule 24(b) of the Federal Rules of Civil Procedure.

STATUTES AND RULE INVOLVED.

Section 1 of the Sherman Act, 15 U. S. C. § 1, and Section 4 of the Clayton Act, 15 U. S. C. § 15, both of which are set forth in the petition (Pet. 5), have no relevance to the questions here involved.

Rule 24 of the Federal Rules of Civil Procedure (Pet. 5-6), is the only pertinent statute or rule involved. However, since Petitioner has failed to quote one of the most relevant portions of that rule, we will here set out Rule 24 in its entirety:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.
>
> "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. *When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be*

permitted to intervene in the action.[1] In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403."

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1. The italicized sentence is omitted in Petitioner's quotation of Rule 24. This sentence was added to Rule 24 on December 27, 1946, 329 U. S. 839, 853-854, 875, and became effective on March 19, 1948.

STATEMENT.

On September 8, 1961 (2a), Pennsylvania Public Utility Commission filed identical motions "for leave to intervene * * * under Rule 24 Federal Rules of Civil Procedure, as a party plaintiff" (18a) in sixteen treble-damage antitrust actions, in the District Court for the Eastern District of Pennsylvania, brought by Philadelphia Electric Company in connection with purchases of electrical equipment from defendants.[2] The motions to intervene, after summarizing the allegations of Philadelphia Electric's complaints and referring to the rate-regulatory duties of the Commission (18a-19a), asserted that the Commission has an "interest" in these cases because "if there shall be recoveries" by the plaintiff in these actions, the Commission "may be obliged" to re-examine plaintiff's rate structure and might decide to lower plaintiff's rates or order refunds to plaintiff's customers (19a-20a).

The motions stated, without any explanatory foundation, that unless the Commission were permitted to become a party it would find it "difficult, if not impossible" to distinguish between compensatory and punitive damages, or, indeed, to decide whether it would be important to make any such distinction at all (20a).

Finally, the Commission suggested, "as an additional and separate ground of intervention," that it should be allowed to intervene as a "representative of the Pennsylvania public at large" to assure that "any recoveries which may be made by way of settlement shall be proper and adequate, and that the Court will have available, if it de-

2. The record in this case involves only one of these actions, Civil Action No. 30,015. By stipulation, decision of the issue by the court below controlled the disposition of the motions to intervene in the other 15 cases.

In each of the courts below, a single brief in opposition was submitted on behalf of all defendants. This practice is being continued here.

sires, the Commission's special knowledge of public utility operations and regulation which affect many aspects of these cases. * * *'' (20a-21a). Nowhere in its motions did the Commission assert any claim against any of the defendants, either on behalf of itself or on behalf of any consumer.[3]

All of the defendants opposed the motions to intervene. After the positions of all concerned had been fully briefed and argued, Senior Judge William H. Kirkpatrick made an oral ruling from the bench denying the motions (50a). Subsequently, a written order denying the motions was signed (51a) and entered (3a).

The Court of Appeals for the Third Circuit affirmed. In an opinion by Judge Hastie (Pet. 23-31), that court ruled that the Commission had no absolute right to intervene in these cases and that, to the extent that the Commission's motions requested permissive intervention, their denial could not be said to have been an abuse of discretion. On October 23, 1962, the Commission's petition for rehearing was denied.

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3. The Commission did not attach any proposed pleading to its motions to intervene. On October 19, 1961 (4a), 44 days after the motions to intervene had been filed and only a few days before they were to be argued, the Commission lodged with the clerk of the District Court what purported to be a proposed "complaint" in each case. The "complaints" consisted of nothing more than a verbatim recital of the statements made in the motions to intervene (27a-29a), plus an additional paragraph in which the Commission asserted that it "adopts as its own, the averments of plaintiff's complaint" (29a). Once again, there was no claim asserted by the Commission against any of the defendants.

Argument.

The Pennsylvania Public Utility Commission urges that it must be given the status of a party in the treble damage suits brought by the Philadelphia Electric Company against respondents. The Commission grounds this demand on the fact that it regulates the rate structure of Pennsylvania utilities, including Philadelphia Electric. This regulatory relationship is said to give rise to an "interest" sufficient to create an absolute right to intervene or to make it mandatory that permission to intervene be granted.

Both courts below properly rejected the Commission's contentions. From the outset, it has been clear that the Commission asserts no claim against the respondents. Required by Rule 24(c), *supra* p. 4, to attach to each of its motions to intervene "* * * a pleading setting forth the claim or defense for which intervention is sought * * *", the Commission filed, in each case, a "complaint" which, after reiterating the allegations of its motion, merely adopted the complaint of Philadelphia Electric. There has been no suggestion that counsel for Philadelphia Electric cannot adequately press the claims asserted in its complaints.

The earliest point at which the Commission anticipates the need to assert any interest of its own is in connection with the termination of the litigation, by judgment or settlement. The Commission asserts that, at that point, its interest, "* * * presently parallel * * *" with that of Philadelphia Electric, would diverge (Pet. 13); that, therefore, it is "* * * imperative and essential * * *" that the Commission be heard in the trial court "* * * *before* the form and limits of the judgment are finally fixed * * *" in order that the Commission may properly "* * * discharge its duty under state law * * *" (Pet. 13). Only by intervention as a party, the Commission says, can it "* * * examine the nature and amount of the recoveries which may flow

from these suits, in an effort to determine their ultimate effect, if any, on rates and ratepayers. * * *'' (Pet. 13).

In an attempt to give some concrete meaning to these sweeping generalizations concerning the discharge of its ''* * * duty under state law * * *,'' the Commission asserts that, if it is not permitted to intervene, it will not be able, in a subsequent rate inquiry, to separate and identify the punitive and compensatory elements of a recovery by Philadelphia Electric (Pet. 16, 18). The Commission anticipates that Philadelphia Electric will somehow be able to conceal the nature and division of any recovery. As Judge Hastie said, for the court below, this argument ''* * * is plainly without merit. * * *'' (Pet. 29). If Philadelphia Electric recovers by judgment, compensatory damages can be ascertained ''* * * merely by dividing the amount of the judgment by three.'' (Pet. 29). If recovery is by settlement, the Commission cannot be prejudiced. The Commission is not bound by the manner in which the parties may have ''stamped'' any such recovery (Pet. 16) and, as the court below pointed out, the Commission can require full reports from the utility on the details of any settlement (Pet. 29).

Certainly there is nothing in the Commission's rate-regulatory duties which furnishes a logical reason why the Commission should be accorded party status, let alone require that such status be given. The Commission, in reality, presses for this status on the theory that, as a party, it will have power to police any settlement negotiations and ''* * * to appear or to be heard on the issues of fairness or adequacy * * *'' of any recovery (Pet. 17-18). This suggests that the Commission would attempt to interfere with any settlement which it did not like. If the Commission has any such power by virtue of state law, the power could be exercised directly. If the Commission has no such power —and it points to none—the lack cannot be supplied by a district court order under Rule 24 of the Federal Rules of Civil Procedure.

Thus, there is no warrant for the Commission's characterization of the rulings below, which denied intervention, as "formalistic" rather than "fair" (Pet. 12). The Commission's motion failed entirely to satisfy Rule 24, which embodies all of the factors, including considerations of fairness, which determine whether intervention should be granted.

A. INTERVENTION UNDER RULE 24.

An application for intervention in a federal district court action must meet the requirements of Rule 24, or fail. 4 **Moore, Federal Practice,** ¶ 24.07, at p. 33 (2d ed. 1950). The rule controls applications for intervention by public bodies as well as private parties. See **Securities and Exchange Commission v. U. S. Realty & Improvement Co.,** 310 U. S. 434, 458 (1940). And see discussion of the 1946 amendment to Rule 24(b), *supra*, pp. 3-4, in 4 **Moore, Federal Practice,** at pp. 64-66. Therefore, the Commission's motion must be measured by Rule 24. So measured, the correctness of the rulings below is apparent.

1. Intervention as of Right Under Rule 24(a)(2).

Rule 24(a)(2)—which the Commission cites as applicable here (Pet. 12)—requires an applicant for intervention as of right to show both that he has an "interest" which is or may be "bound" by a judgment in the action *and* that the representation of his interest is or may be inadequate. **Sam Fox Publishing Co. v. United States,** 366 U. S. 683, 691-692 (1961); 4 **Moore, Federal Practice,** at p. 35.

These requirements have been sharply defined. The "interest" must be one already involved in the litigation[4]

4. **United States v. Columbia Gas & Electric Corp.,** 27 F. Supp. 116, 119 (D. Del. 1939), *appeal dismissed sub nom.* **Missouri-Kansas Pipe Line Co. v. United States,** 108 F. 2d 614 (C. A. 3, 1939), *cert. denied sub nom.* **Missouri-Kansas Pipe Line Co. v. Columbia Gas & Electric Corp.,** 309 U. S. 687 (1940). The district court opinion in **Columbia Gas** has recently been cited with approval by this Court. **Sam Fox Publishing Co. v. United States,** 366 U. S. 683, 689, 690 (1961).

and must be of such nature as to give rise to a justiciable controversy.[5] The applicant is "bound" within the meaning of Rule 24(a)(2) only where he may be "legally bound," that is, subject to a plea of *res judicata* in any subsequent assertion of his interest. **Sam Fox Publishing Co. v. United States,** 366 U. S. at p. 694; **Sutphen Estates v. United States,** 342 U. S. 19, 21 (1951).[6] Finally, to establish inadequacy of representation, there must be a showing that the party representing the same interest as that of the applicant is "* * * conducting the litigation in bad faith, collusively, or negligently; * * *." **Sam Fox Publishing Co. v. United States,** 366 U. S. at p. 692, footnote 4. And see 4 **Moore, Federal Practice,** at pp. 38-39.

Here, the Commission satisfies none of the requirements. There is no "interest" of the Commission that is presently involved in the litigation. At most, the Commission has a concern, which it shares with Philadelphia Electric, that Philadelphia Electric emerge victorious in these cases with as large a recovery as possible. But there is no suggestion that Philadelphia Electric, one of Pennsylvania's largest utilities and represented by able counsel, will fail to protect this concern adequately.

There is no other "interest" of the Commission which is presently involved in the litigation and none of a justiciable nature. The Commission's concern hinges on a future contingency and can be adequately implemented by direct regulatory action under state law. Nothing in the instant

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5. **Land O'Lakes Creameries v. Louisiana State Board,** 160 F. Supp. 387, 388 (E. D. La. 1958) (three-judge court); **Brotherhood of Railway and Steamship Clerks v. Atlantic Coast Line R. R.,** 88 F. Supp. 115 (E. D. N. C. 1950), *aff'd,* 181 F. 2d 944 (C. A. 4, 1950), *cert. denied,* 340 U. S. 851 (1950).

6. The **Sam Fox** decision puts at rest the divergence of views on this point which developed following the **Sutphen** decision. See discussion of cases after **Sutphen** in **Developments in the Law: Multiparty Litigation in the Federal Courts,** 71 Harv. L. Rev. 874, 901-902 (1958); Note, 63 Yale L. J. 408, 410-411 (1954).

proceedings can bind the Commission in the legitimate exercise of its functions.[7]

It is clear, therefore, that the court below correctly concluded that "* * * no basis was shown for intervention of right under the mandate of Rule 24(a)(2)." (Pet. 30).

2. Permissive Intervention Under Rule 24(b).

In the alternative, the Commission challenges the ruling below (Pet. 30) that the district court did not abuse its discretion in declining to permit intervention under Rule 24(b). To support this assertion, the Commission quotes a portion of the dissenting opinion (Pet. 19-20), and refers, additionally, to cases in which district courts have exercised discretion in favor of permitting intervention (Pet. 20-21).[8]

Cases in which intervention has been permitted as a matter of discretion have no bearing on the question whether, even in the same circumstances, it would have been

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7. The petition is completely incorrect in stating that the "* * * majority of the Court of Appeals impliedly recognizes that as a practical matter the Commission's regulatory powers will be circumscribed by the form and the pecuniary limits of any judgment which the District Court may enter, and that the Commission *is* therefore in every practical sense 'bound by [such] judgment'." (Pet. 12). The view of the majority below is precisely to the contrary. The opinion states: "Even if the phrase 'bound by a judgment in the action' is construed to embrace any prejudice to the legal rights or interests of the would be intervenor, no such prospective injury has been shown here." (Pet. 27-28). While the petition puts no explicit reliance on the decision in **Textile Workers Union v. Allendale Co.**, 226 F. 2d 765 (C. A. D. C. 1955), *cert. denied*, 351 U. S. 909 (1956), the misstatement of the majority ruling on the particular effect on the Commission of the denial of intervention is clearly an attempt to equate the situation here to that involved in **Allendale.** The cases are entirely dissimilar on this point. Here the Commission is in no way prejudiced.

8. In fact, the Commission relies heavily on one of these permissive intervention cases as authority for the proposition that it has an absolute right to intervene in the present litigation. See **Mitchell v. Singstad**, 23 F. R. D. 62, (D. Md. 1959) (Pet. 14-15).

an abuse of discretion to deny intervention. The only question which can possibly be reviewed where permissive intervention is denied is that of abuse of discretion. **Brotherhood of R. R. Trainmen v. Baltimore & O. R. R.**, 331 U. S. 519, 524 (1947).[9]

The Commission offers, in an endeavor to show abuse of discretion, a long quotation from the dissenting opinion of Judge McLaughlin in the court below (Pet. 19-20). In the quoted excerpt, Judge McLaughlin took as his major premise the "imperative public interest in these actions" and, from this, asserted a right in the Commission, as the "expert, responsible representative" of the people of Pennsylvania to "check" on this "final reckoning of defendants' unconscionable activities * * *."[10] He referred to the Com-

9. We seriously question here, as we did below, whether the Commission, in the circumstances of this case, can appeal from the district court denial of permission to intervene under Rule 24(b). The broad concept, that an appeal will lie to review alleged abuse of discretion in denying permissive intervention, presupposes that the denial has some final impact on the substantive rights of the applicant. But where, as here, the applicant has other adequate means of asserting its substantive rights, the order denying intervention lacks finality and is, therefore, not appealable. See **Cameron v. President and Fellows of Harvard College**, 157 F. 2d 993, 996-997 (C. A. 1, 1946), cited with approval in **Sam Fox Publishing Co. v. United States**, 366 U. S. at p. 694.

Here, the denial of permissive intervention in no way precludes the Commission from asserting any rights it may have in appropriate state administrative or court proceedings.

10. Judge McLaughlin's assumption, that the Commission is somehow proceeding or asserting a claim against the defendants, is characteristic of a confusion which appears throughout his dissent. The Commission asserts no claim against the defendants. Nevertheless, on a record consisting only of complaint, intervention papers, and docket entries, Judge McLaughlin saw fit to record in permanent form his personal views on the merits of these litigations between plaintiff and defendants (Pet. 32-36). Thus he characterized the situation involved in these cases as a "* * * nauseating mess * * *", stated that defendants' opposition to the Commission's attempt to intervene was "* * * pretentious * * *" and found that no one seriously questions that these cases will be settled for a large amount

mission's direct regulatory powers as providing "• • • some meaningless gesture after the final disposition of the claims." On the basis of these and similar observations, Judge McLaughlin felt that the Commission must be permitted to intervene to eliminate "• • • possible inadequate handling of these important claims."

We have discussed above the question of adequacy of representation. We have also discussed the other factors suggested by Judge McLaughlin, *i.e.*, the nature of the Commission's "interest", its lack of a justiciable claim, and its meaningful freedom directly to exercise its own regulatory powers over Philadelphia Electric. All of these considerations demonstrate that the denial of permissive intervention could not be characterized as an abuse of discretion.[11]

To show that intervention must be granted, Judge McLaughlin also attributed to the Commission the general status of an expert. It is obvious, we submit, that the Commission possesses no expert knowledge on the basic issues involved in these actions, *i.e.*, violation of the antitrust laws, injury and damages. As Judge Hastie remarked, to the extent that the Commission has "• • • information relevant to the plaintiff's claim, or if it thinks it can supply useful expert opinion", the district court can avail itself of any such assistance (Pet. 28). The possibility that the Commission may assist the district court

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(Pet. 33, 35). These views, utterly without record support and unfairly prejudicial to the defendants, are of no relevance to the question whether the Commission must be accorded the status of a party. The Commission proceeds from an avowed concern over the future activities of the plaintiff, not the defendants (Pet. 16, 18).

11. The court below so held (Pet. 30). Judge McLaughlin attributed to the majority an unduly narrow holding on permissive intervention, namely, that it would occasion delay (Pet. 36). The delaying effect of intervention is one of the factors specifically for consideration under Rule 24(b) and the court below properly gave recognition to it. However, delay was not the only basis on which the court below held that there had not been abuse of discretion, as a fair reading of that court's opinion discloses (Pet. 30).

does not constitute a "* * * showing of such clear and substantial advantage from the allowance of intervention as could make its denial arbitrary or an abuse of discretion. * * *" (Pet. 30).

B. INTERVENTION WITHOUT REGARD TO THE REQUIREMENTS OF RULE 24.

In the district court, the Commission characterized its motion as made "* * * under Rule 24 * * *" (18a), and its "Questions Presented" before this Court are in terms of Rule 24 (Pet. 4). But what the Commission really urges is that, without regard to the requirements of Rule 24, a public body must be permitted to intervene as a party whenever it represents to a district court that it has determined such intervention to be in protection of the public interest which it represents. The rule thus sought, which runs far beyond the privilege of intervention accorded even to the United States, finds no support in the authorities to which the Commission points. To the contrary, the controlling authority, the 1946 amendment to Rule 24(b), plainly points to the opposite conclusion.

Missouri-Kansas Pipe Line Co. v. United States, 312 U. S. 502 (1941), is described by the Commission as holding that "* * * the public interest and the practicalities apparent to the lower court * * *" control "* * * where intervention is sought in what the Court terms 'unconventional form'" (Pet. 17). The **Missouri-Kansas** case sets forth no such test. In that case, an antitrust consent decree, which specifically protected the economic rights of a third party, expressly provided that, upon application, the third party might become a party to enforce the economic rights protected by the decree. Rule 24 was invoked in opposition to an application by the third party under the decree. This Court held that arguments based on Rule 24 misconceived "* * * the basis of the right now asserted * * *" whose "* * * foundation [was] the consent decree * * *." 312 U. S. at p. 506. In the circumstances of that

case, "* * * the codification of general doctrines of intervention contained in Rule 24(a) * * *" was said not to "* * * touch [the] problem * * *." 312 U. S. at p. 508. In other words, the special status specifically accorded by the express terms of the consent decree was not viewed as having anything to do with the "* * * conventional form of intervention * * *." 312 U. S. at p. 506.

There is nothing in the **Missouri-Kansas** case which supports the proposition that Rule 24 should be ignored whenever a public body wants to intervene in an existing litigation. Nor does this contention find any support in **Securities and Exchange Commission v. U. S. Realty & Improvement Co.**, 310 U. S. 434 (1940), upon which the Commission places reliance (Pet. 20-21). As is made clear by the excerpt quoted by the Commission, this Court there held that a district court had not abused its discretion in permitting the SEC to intervene in a reorganization proceeding brought under Chapter XI of the Bankruptcy Act. This Court recognized that a valid purpose was served by permitting the SEC to intervene, namely, the presentation of objections to an improper exercise of Chapter XI jurisdiction which, if permitted to continue, would defeat the public interest which the SEC was under a duty to represent in Chapter X proceedings. Rule 24 was recognized as controlling. 310 U. S. at p. 458. And the Court held that, under Rule 24(b), an administrative agency may be permitted to intervene to prevent evasion of its direct statutory power.[12]

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12. **Illinois-Iowa Power Co. v. North American Light and Power Co.**, 49 F. Supp. 277 (D. Del. 1943), and **Textile Workers Union v. Amazon Cotton Mills**, 76 F. Supp. 165 (M. D. N. C. 1948), *rev'd on other grounds*, 167 F. 2d 183 (4th Cir. 1948), involve the same principle as the **U. S. Realty** case. In each case, a federal administrative agency (SEC in the former and NLRB in the latter) was permitted to intervene as a matter of discretion in order to urge that court proceedings should be stayed during the pendency of similar proceedings before the agency. Neither case deals with the question of an absolute right to intervene.

Here, the Commission's reliance is not on this Court's decision in the **U. S. Realty** case but on a law review article which criticized that decision for declining to hold that government agencies have an absolute right to intervene in suits between private parties (Pet. 17). This view was carefully considered and rejected in 1946 when Rule 24(b) was revised. 4 **Moore, Federal Practice**, at pp. 4-5, 64-66. Absent a statute expressly authorizing intervention, intervention by a federal or state governmental agency remains a matter within the discretion of the trial court. See Rule 24(b), *supra*, pp. 3-4.

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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